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## Viewing cable 09QUITO973, GOE "EXPLAINS" TERMINATION OF INVESTMENT TREATIES...

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### Understanding cables

Every cable message consists of three parts:

- The top box shows each cables unique reference number, when and by whom it originally was sent, and what its initial classification was.
- The middle box contains the header information that is associated with the cable. It includes information about the receiver(s) as well as a general subject.
- The bottom box presents the body of the cable. The opening can contain a more specific subject, references to other cables ([browse by origin](#) to find them) or additional comment. This is followed by the main contents of the cable: a summary, a collection of specific topics and a comment section.

To understand the justification used for the classification of each cable, please use this [WikiSource](#) article as reference.

### Discussing cables

If you find meaningful or important information in a cable, please link directly to its unique reference number. Linking to a specific paragraph in the body of a cable is also possible by copying the appropriate link (to be found at the paragraph symbol). Please mark messages for social networking services like Twitter with the hash tags **#cablegate** and a hash containing the reference ID e.g. **#09QUITO973**.

Reference ID	Created	Released	Classification	Origin
09QUITO973	2009-11-17 22:43	2011-08-30 01:44	CONFIDENTIAL	Embassy Quito

Appears in these articles:

<http://www.eluniverso.com/2011/04/26/1/1355/cable-235229.html>

VZCZCXYZ0000  
RR RUEHWEB

DE RUEHQT #0973/01 3212243  
ZNY CCCCC ZZH  
R 172243Z NOV 09  
FM AMEMBASSY QUITO  
TO RUEHC/SECSTATE WASHDC 0347  
INFO RUCPDO/DEPT OF COMMERCE WASHINGTON DC  
RUEHBO/AMEMBASSY BOGOTA  
RUEHC/DEPT OF AGRICULTURE WASHINGTON DC  
RUEHCV/AMEMBASSY CARACAS  
RUEHGL/AMCONSUL GUAYAQUIL  
RUEHPE/AMEMBASSY LIMA  
RUEHQT/AMEMBASSY QUITO

C O N F I D E N T I A L QUITO 000973

SIPDIS  
DEPT FOR WHA/AND, WHA/EPSC AND EEB/IFD/OIA  
DEPT PLEASE PASS TO USTR FOR BENNETT HARMAN

E.O. 12958: DECL: 2019/11/17

TAGS: [EINV](#) [ECON](#) [EC](#)

SUBJECT: GOE "EXPLAINS" TERMINATION OF INVESTMENT TREATIES...

id: 235229  
date: 11/17/2009 22:43  
refid: 09QUITO973  
origin: Embassy Quito  
classification: CONFIDENTIAL  
destination: 09QUITO905|09QUITO938|09QUITO949  
header:  
VZCZCXYZ0000  
RR RUEHWEB

DE RUEHQT #0973/01 3212243  
ZNY CCCCC ZZH  
R 172243Z NOV 09  
FM AMEMBASSY QUITO  
TO RUEHC/SECSTATE WASHDC 0347  
INFO RUCPDO/DEPT OF COMMERCE WASHINGTON DC  
RUEHBO/AMEMBASSY BOGOTA  
RUEHC/DEPT OF AGRICULTURE WASHINGTON DC  
RUEHCV/AMEMBASSY CARACAS  
RUEHGL/AMCONSUL GUAYAQUIL  
RUEHPE/AMEMBASSY LIMA  
RUEHQT/AMEMBASSY QUITO

----- header ends -----

C O N F I D E N T I A L QUITO 000973

SIPDIS  
DEPT FOR WHA/AND, WHA/EPSC AND EEB/IFD/OIA  
DEPT PLEASE PASS TO USTR FOR BENNETT HARMAN

E.O. 12958: DECL: 2019/11/17  
TAGS: [EINV](#) [ECON](#) [EC](#)  
SUBJECT: GOE "EXPLAINS" TERMINATION OF INVESTMENT TREATIES

REF: 09 QUITO 905; 09 QUITO 949; 09 QUITO 938

CLASSIFIED BY: Andrew Chritton, Charge, State, Exec; REASON: 1.4(B),  
(D)

#### Summary

11. (SBU) Ecuadorian Foreign Minister Falconi explained the reasoning behind the GoE's decision to terminate 13 bilateral investment treaties (BITs) during a November 12 meeting with Embassy representatives of the affected countries. Falconi reiterated the GoE's claim that Ecuador's 2008 Constitution was forcing the government's hand, but said the GoE was preparing a model to use for negotiation of new investment agreements, which it expected to commence in January. The GoE's new model would limit settlement of State-Investor disputes to regional, rather than international, arbitration, and eliminate provisions providing "national treatment" for foreign investors. Although the National Assembly has not yet responded to the GoE's request to approve termination of the BITs, we expect the GoE will eventually receive this approval and submit formal notification to terminate the U.S.-Ecuador BIT. End Summary.

#### Background

12. (SBU) On September 29, 2009, President Correa sent a letter to the National Assembly requesting approval to terminate thirteen of the country's bilateral investment treaties (BITs). The affected treaties were with: Argentina, Canada, Chile, China, Finland, France, Germany, the Netherlands, Sweden, Switzerland, the United Kingdom (includes Ireland), the United States, and Venezuela. The GoE did not request approval to terminate BITS with Spain, Italy, Peru and Bolivia. The National Assembly has not yet responded to the President's request. (See Ref A for Post's initial reporting on this decision and Ref B for National Assembly President

Cordero's comments on this process.)

#### MFA Scrambling to Minimize Diplomatic Fallout

13. (SBU) On November 12, Minister of Foreign Affairs Falconi convened a meeting of ambassadors and representatives from those Missions with BITs that the GoE plans to terminate. Falconi opened the meeting by apologizing to those Ambassadors whom the MFA had been unable to meet with individually, but said the public attention the issue was receiving had prompted the MFA instead to call quickly a joint meeting. He said he wanted to explain in person the legal and policy reasons for the government's action, the transition process, and to assure the affected Missions that foreign investment is not unprotected in Ecuador.

14. (SBU) Reinforcing what had been conveyed to the Ambassador on October 26 by then Acting Foreign Minister Pozo (refA), Falconi reiterated that the GoE was obligated under Ecuador's 2008 Constitution to terminate any treaty that would submit the Ecuadorian state to international arbitration in a dispute with a private investor. He asserted that there was no other option. Falconi also noted that constitutional provisions, and GoE policy, require that foreign direct investment be in alignment with Ecuador's National Development Plan.

15. (SBU) Falconi took pains to emphasize that foreign investment was protected in Ecuador, not only through bilateral investment treaties, but by Ecuador's Constitution and legal framework. Under the Constitution, legal security -- even for investment -- was considered a human right and arbitration was recognized as a valid mechanism for dispute resolution, as long as it was conducted in a national or regional forum. He asserted that Ecuador was supportive of foreign investment, but that the country was now

applying an alternative model in which it was seeking social justice. Falconi claimed that under the new model, Ecuador had already received important foreign investments from China (hydro-electrical project financed by China, ref C) and Venezuela.

#### Assembly Approval Expected

16. (C) On the process and timing of BIT termination, Falconi said the National Assembly would make a pronouncement within 15 days on President Correa's request for approval to terminate the BITs. He appeared confident that the Assembly's approval would be forthcoming. (Note: National Assembly President Cordero expressed some misgivings about terminating the BITs in a November 6 meeting with the Ambassador (ref B). End note.) An inter-ministerial group is developing a new model investment agreement which they hope to complete soon. Through its new investment model, Falconi said the GoE seeks to balance the interests of the investor and the regulatory role of the State. He emphasized that the GoE wants to

promote investment, but that private foreign investment was viewed as "complementary" to State investment (Constitution Art. 339).

#### Decision - Part of Longtime Policy Review

17. (SBU) In order to provide context for the GoE's actions, Falconi outlined events leading up to Correa's letter to the Assembly. Falconi said review of the country's investment policies began before the Correa Administration, noting the work of a COMEXI

advisory council in 2004 to analyze the commercial and policy impacts of the country's existing BITs. In 2007, a report found little correlation between the existence of a BIT and decisions made by investors. According to Falconi, the report concluded that issues such as taxation, market size, labor laws, political stability and legal security were instead the major determinants of investment decisions.

18. (SBU) Falconi noted that in 2008 the GoE terminated without fanfare nine BITs, which they had determined had not produced significant investment flows. Later that year, the GoE decided to suspend negotiation of new BITs until a policy was better defined. In October 2008, Ecuador's new Constitution was approved. In February 2009, Ecuador's Foreign Trade Council (COMEXI) issued Resolution 474 which directed the MFA to renegotiate the country's BITs, prompting President Correa's letter to the Assembly in September. In July 2009, Ecuador withdrew from the World Bank International Center for Settlement of Disputes (ICSID) with the aim of maintaining Ecuador's sovereignty and achieving impartiality in the settlement of disputes, according to Minister Falconi. Falconi explained that BITs with Spain, Italy, Peru and Bolivia were not being terminated because the terms of those treaties do not allow termination at this time.

More Details from MFA Advisor

19. (SBU) Minister Falconi then turned the meeting over to MFA legal advisor, Marco Abuja, and departed. Abuja claimed the administration was working with urgency on its plan to renegotiate all the investment treaties out of concern that the existing treaties are vulnerable to a constitutional challenge that could render them null and void. On this point, the EU representative expressed concern that the Constitution, a document limited to internal affairs, could be used to void an international treaty. While noting respect for Ecuador's sovereignty, he opined that provisions of the Constitution represent internal issues and should not affect bilateral treaties.

110. (SBU) With regard to international arbitration, Abuja stated that Article 422 of Ecuador's Constitution does not permit Ecuador to enter into international agreements in which the State would be subject to rulings by international dispute settlement bodies in State-investor disputes. According to Abuja, the Constitution requires that State-investor disputes only be heard before national or regional dispute settlement bodies. Ecuador aims to develop a new arbitration mechanism that guarantees equity and equal conditions for all parties within UNASUR or ALBA. Abuja also mentioned that the Organization of American States (OAS) is considering the establishment of a dispute settlement body in Central America or the Caribbean. Abuja noted that the restriction regarding international arbitration did not apply in cases of State-State disputes. After Abuja's presentation, the Canadian ambassador commented that Canadian investors were very concerned with the GoE's decision and pointed out that it would be impossible to negotiate a new investment agreement calling for regional arbitration when these regional dispute settlement bodies do not yet even exist. The German ambassador challenged Abuja's interpretation of Article 422 claiming that even regional arbitration did not appear to extend to nationals that were not citizens within Latin American. Abuja claimed that the GoE interpretation of the article was that it applied to investors of any nationality. (Note, the EU representative affirmed during the meeting that any new investment agreement would be negotiated between Ecuador and the EU, rather than with individual EU member states.)

Timing

¶11. (SBU) Abuja said the MFA plans to terminate (provide written notification of intent to terminate) the BITs in January 2010 and then immediately start negotiations on the new investment agreements. He also described the GoE's view of the relationship between the new investment agreements it hopes to negotiate and the existing BITs, which all have provisions that extend protection for existing investments for a number of years beyond termination. He described as a "transition period" the time from the GoE's notification of termination of an existing BIT until a new investment agreement was negotiated and in force. From the GoE's perspective, the new investment agreement would replace the BIT, rendering it and its international arbitration provisions void. In other words, under the MFA's scenario, the existing BITs would not be applied for the 10-15 years after termination stipulated in the treaties, but only until a new agreement is concluded. The MFA encouraged countries to quickly negotiate new investment agreements in order to avoid a lapse in coverage for new investments.

#### Arbitration and National Treatment

¶12. (SBU) Abuja detailed the GoE's concerns with, and the perceived weaknesses of, current international dispute resolution mechanisms. From the GoE's perspective, international arbitration permits legal challenges to Ecuador's public policies in fora outside Ecuador's national jurisdiction, contrary to what is permitted under Ecuador's 2008 Constitution. International arbitration processes are not transparent and do not provide public access to documents in the cases. Furthermore, ICSID rulings are in violation of Ecuador's Constitution in the sense that they are final, without any possibility of annulment by another authority. Finally, ICSID does not consider Ecuador's Constitution as a fundamental norm for its rulings. Abuja noted that most of Ecuador's current BITs specifically identify ICSID as the relevant dispute settlement body.

¶13. (SBU) Abuja said "national treatment" provisions would also be eliminated in the new investment agreements envisioned by the GoE. As justification, Abuja argued that the principle of "national treatment" actually places local investors at a disadvantage. He explained that international dispute resolution bodies allow foreign investors to take their cases directly to

ICSID, while local investors must follow the administrative procedures in local courts. Abuja also stated that the administration wants to be able to give preference to local investors in certain sectors.

#### New Arbitration Mechanisms

¶14. (SBU) Abuja outlined aspects of the new regional arbitration bodies being considered by UNASUR, ALBA and the OAS, such as: application of arbitration procedures only after all administrative instances have been exhausted; minimal costs; resolution period of 12 months maximum; public list of arbitrators; and annulment possible by a superior authority. From the GoE's perspective, in evaluating investment dispute claims, new concepts should be considered, such as: standards related to the pre-establishment of investment, environmental impact, post-establishment of investment, and the defense of human rights; the fulfillment of National Development Plan objectives; corporate social responsibility; and anticorruption norms.

#### Comment

¶15. (C) Although the GoE may find it convenient to claim that prior administrations were responsible for initiating the review process that has led the government to seek termination of its bilateral investment treaties, the Constitution, the primary justification for termination of the BITs, is the undisputed child of the Correa administration. The determinant provisions of the Constitution reflect the ideology and priorities of this government. Therefore, there is little internal impetus for the GoE to seek alternative ways of dealing with the implications of the new Constitution regarding foreign investment. There may be a window of opportunity in which the USG and like-minded countries can reason with the GoE regarding the negative repercussions that are likely should they follow through with their plan. While termination of the BITs is not yet a done deal, we suspect that in the end the GoE will get approval from the National Assembly and move forward with termination of the BITs, and its efforts to negotiate new investment agreements. At that point, the USG will have to decide whether it is preferable to maintain the existing BIT through its termination phase plus ten years protection for existing investment, or consider the GoE's offer to negotiate a new agreement on their terms.

CHRITTON

=====CABLE ENDS=====